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No. 664

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1966

INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY,

Petitioner,

vs.

CHARLES SHORTER AND MAXINE SHORTER, et al,

Respondents.

On Writ of Certiorari to The United States Court of Appeals for The Sixth Circuit

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BRIEF FOR RESPONDENT THE LOSANTIVILLE BUILDING AND SAVINGS COMPANY IN OPPOSITION

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QUESTION PRESENTED

Is this case one in which a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in the above entitled case?

STATEMENT

The petitioner sets forth in the last paragraph at the bottom of page 8 of its brief, the following:

> "The District Court made no findings of fact, entered no conclusions of law, made no reference in its Memorandum Opinion, and entered no judgment or order on the cross claim of Petitioner against Mortgagors,—notwithstanding that the allegations of Petitioner's cross claim were established by the record before the Court and were uncontroverted, unopposed and uncontested."

This statement should be augmented by saying that although the District Court made no specific findings, no specific conclusions, no specific references and no specific judgment or order as claimed by Petitioner in the aforementioned paragraph, the consideration of such findings, conclusions and references were inherent in the decisions and holdings and findings of the District Court and the Court of Appeals.

SUMMARY OF ARGUMENT

1. Petitioner's questions are not confined to distinct issues and questions of law.

2. This case and the issues presented are not of general importance.

ARGUMENT

Respondent, The Losantiville Building and Savings Company, hereinafter referred to as Mortgagee, submits this brief to summarily point out why the petition for a Writ of Certiorari should be denied:

1 (a) Petitioner's questions are not confined to distinct issues and questions of law. In its first two questions

(page 2 of Petitioner's Brief) it complains that the Court of Appeals ignored five (5) different Rules of the Federal Rules of Civil Procedure and approved a judgment order without regard to those same five (5) rules. Again, on page 10 of Petitioner's Brief, complaint is lodged as to said Court's ignoring, disregarding and failure to adhere to the Federal Rules of Civil Procedure. It was stated in *United States* v. *John Barth Company and United States Fidelity and Guaranty Company*, 276 U.S. 606, 72 L.Ed. 728, 48 SCR 337,

> "The questions certified in this case require in their answer a consideration of eight sections in the Revenue Acts of 1918 and 1921, 1924 and of 1926 and are not properly confined to any distinct question or proposition of law and need not be answered."

It was stated in Syllabus 1 of *White* v. *Johnson*, 282 U.S. 367, 75 L.Ed. 388, 51 SCR 115,

> "Upon certificate the Court will not answer questions of objectionable generality; and a question is improper which is so broad and indefinite as to admit of one answer under one set of circumstances and a different answer under another."

It thus appears Petitioner's questions encompassing the many Rules of Civil Procedure are too indistinct, broad and indefinite to support the issuance of a Writ of Certiorari.

(b) The *White* case also says, in Syllabus 3,:

> "The Court is not required to answer questions certified which are contingent upon an affirmative response to another question which it has declined to answer."

In view of this, it is important to note that Petitioner's claims that the District Court and the Court of Appeals ignored, disregarded and failed to respond to its allegations

on right of subrogation and assignment are not well founded. On the contrary, said Courts carefully considered them and found them wanting and did not directly or affirmatively respond to them; they are not now required to respond to them. Further, the parties required to determine the issues were at all times before the Courts, as were the pleadings of all the parties and the mortgage held by the Mortgagee. Also before the Courts was the agreed statement of facts, the depositions, the documents, the briefs and arguments of counsel. In view of all of this the Court specifically held:

> "6. Upon the satisfaction of the judgment in favor of The Losantiville Building and Savings Company, its mortgage from Charles Shorter and Maxine Shorter, recorded in Volume 3082, page 699, of the Hamilton County, Ohio Mortgage Records, shall be cancelled by the Operation of this decree." (See appendix B, page 28, paragraph 6 of Petitioner's Petition for Writ of Certiorari.)

It, therefore, appears that neither the District Court nor the Court of Appeals, refused to consider Petitioner's cross-claim, nor were ignorant of questions presented on appeal, nor refused to determine questions of law assigned as error on appeal, nor failed to make determinations of law presented on appeal with respect to Petitioner and its alleged right of subrogation and assignment. The District Court could not hold that Petitioner was entitled to be subrogated to Mortgagee's rights under the mortgage and receive assignment of the mortgage and at the same time cancel the mortgage. Accordingly the questions presented by the Petitioner were answered by the District Court and approved by the Court of Appeals, though perhaps not to the satisfaction of Petitioner.

2. Many cases have held that only questions of gravity and importance should be certified to the Supreme Court. A few of these cases are as follows:

Lau Ow Bew, Petitioner, 141 U.S. 583, 35 L.Ed. 868, 12 SCR 43, says in the first syllabus:

"Only questions of gravity, and importance should be certified to this Court by the Circuit Courts of Appeals, under the provisions of the Act of March 3, 1891, C. 517, Sec. 6."

In re Woods, Petitioner, 143 U.S. 202, 36 L.Ed. 125, 12 SCR 417, says in the Syllabus:

"The questions . . . (2) whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment was properly applied on the trial of a case, does not fall within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them."

Forsyth v. *Hammond,* 166 U.S. 506, 41 L.Ed. 1095, 17 SCR 665, says in the second syllabus:

"While this power is coextensive with all possible necessities, and sufficient to secure to this court a final control over litigation in all the Courts of Appeal, *it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy this Court that the importance of the question involved,* the necessity of avoiding conflict between two or more Courts of Appeal and the Courts of a State, or some matter affecting the interests of the Nation, in its internal or external relations, *demands such exercise.*" (Italics ours.)

In the case at bar the Petitioner has been ordered to pay this Respondent, The Losantiville Building and Savings Company, a judgment of approximately Nine thousand ($9,000.00) dollars, plus interest, pursuant to a con-

tract for the benefit of a third party. Likewise, the Court ordered the mortgage to be cancelled. The Court, thus, did not subrogate Petitioner to the rights of Mortgagee, or assign the mortgage to the Petitioner. The Petitioner now says this order is in error; that the Court of Appeals ignored questions presented on appeal and approved a judgment by the District Court. It alleges said judgment was rendered without regard to the Federal Rules of Civil Procedure in that it refused to determine questions of law specifically assigned as error on appeal. The essence of this is that Petitioner does not agree with the District Court and the Court of Appeals. Such a disagreement is not of sufficient gravity and general importance to sustain the position of the Petitioner.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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